

STATE OF MICHIGAN
COURT OF APPEALS

KAMLESH CHOPRA,

Plaintiff-Appellant,

v

WATERHOUSE SECURITIES, INC.,

Defendant-Appellee.

UNPUBLISHED

September 20, 2002

No. 232352

Oakland Circuit Court

LC No. 00-026285-AZ

Before: O’Connell, P.J., and Griffin and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court’s order dismissing plaintiff’s petition to vacate the arbitration award and confirming the arbitration award against defendant rendered by a National Association of Security Dealers, Inc. (NASD) arbitration panel. The NASD panel awarded plaintiff \$19,360 as damages arising from defendant’s alleged irregularities in managing plaintiff’s securities account during her day trading activities and in liquidating her account for a margin call.¹ The panel awarded defendant \$10,000 for its counterclaim for the debit balance in plaintiff’s account. Plaintiff, in propria persona, petitioned to the circuit court to have the arbitration award vacated, alleging that the arbitration panel (1) refused to consider all the evidence, (2) exceeded its powers, (3) failed to reconsider the award, and (4) was not impartial. Defendant counterclaimed for confirmation of the award. The circuit court confirmed the award. Plaintiff, in propria persona, appealed to this Court. We affirm.

Plaintiff’s first issue alleges that the circuit court erred in denying plaintiff a continuance or adjournment to allow her additional time to obtain counsel. We disagree. The trial court’s decision regarding the granting of a continuance is discretionary and is reviewed for an abuse of discretion. *Soumis v Soumis*, 218 Mich App 27, 32; 553 NW2d 619 (1996). An abuse of discretion exists when the result is so grossly violative of fact and logic that it evidences a perversity of will instead of the exercise of discretion. *Churchman v Rickerson*, 240 Mich App 223, 227; 611 NW2d 333 (2000).

¹ A “margin call” is “[a] demand by a broker to put up money or securities upon purchase of a stock, or, if the stock is already owned on margin, to increase the money or securities in the event the price of the stock has or is likely to fall since purchase.” Black’s Law Dictionary (6th ed).

A court, in its discretion, may grant a continuance or adjournment for good cause. MCR 2.503;² *Zerillo v Dyksterhouse*, 191 Mich App 228, 230; 477 NW2d 117 (1991). While a party to a civil action has a right to counsel granted by the Michigan Constitution, Const 1963, art 1, § 13,³ so does the other party have a right to have the claim against it resolved in a timely manner. *Johnkoski v Johnkoski*, 50 Mich App 542, 546; 213 NW2d 856 (1973). Here, plaintiff had 3½ months to retain an attorney between the time she filed the motion for vacation of the arbitration in propria persona and the date of the hearing. In addition, plaintiff had already been granted two adjournments to give her time to obtain counsel.

In *Bauman v Grand Trunk W R Co*, 363 Mich 604; 110 NW2d 628 (1961), the Michigan Supreme Court recognized that the review of a trial court's discretionary determination whether to adjourn a case depends on the facts of each individual case. *Id.* at 609. In deciding *Bauman*, the Court referred to *McLay v McLay*, 354 Mich 19; 91 NW2d 824 (1958), in which the *McLay* Court did not find an abuse of discretion in the denial of a motion for continuance:

[W]here the appellant's attorney was unable to be present; *where there had been 1 previous adjournment*; where there were out-of-town witnesses present; *where the adjournment request was based on unavailability of counsel, whose presence could not be promised for a considerable period of time*; where the appellant was known to the judge as a lawyer and known to him to have a competent law partner immediately available; and where there was no showing made of any effort to secure or summon witnesses prior to the date set for hearing or as to what such witnesses would testify if called. [*Bauman, supra* at 609 (emphasis added).]

The Court in *Bauman, supra*, looked at these types of factors and decided that the trial court had abused its discretion in denying a continuance in a complex trial where the defense counsel became seriously ill and could no longer represent the defendant. *Id.* at 610.

² MCR 2.503 states, in part:

(A) This rule applies to adjournments of trials, alternative dispute resolution processes, pretrial conferences, and all motion hearings.

(B) (1) Unless the court allows otherwise, a request for an adjournment must be by motion or stipulation made in writing or orally in open court based on good cause.

* * *

(D) (1) In its discretion the court may grant an adjournment to promote the cause of justice. An adjournment may be entered by order of the court either in writing or on the record in open court, and the order must state the reason for the adjournment.

³ Const 1963, art 1, § 13 states:

A suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney.

In the present case, the court did not abuse its discretion in denying plaintiff another continuance to obtain counsel. Plaintiff indicated that she was having trouble locating counsel because she did not have the money to pay a retainer fee and was trying to find an attorney who would work on a contingency basis. While plaintiff's situation is unfortunate, the likelihood that a further continuance would have enabled plaintiff to find an attorney willing to represent her on the terms she desired was remote. Defendant had the right to a timely resolution of this matter. Therefore, the court did not abuse its discretion in denying plaintiff another continuance and confirming the award.

Plaintiff also contends that the arbitration panel "refused to hear evidence material to the controversy"⁴ because it did not listen to the audiotapes she made of her conversations with defendant's representatives over the telephone and at the district office in Troy. We disagree. Judicial review of arbitration decisions is very limited. *Byron Center Pub Schools Bd of Ed v Kent Co Ed Ass'n*, 186 Mich App 29, 31; 463 NW2d 112 (1990). A court may not review an arbitrator's factual findings or decisions on the merits. *Id.* at 31. A court may set aside an arbitration award only if it clearly appears on the face of the award or in the reasons for the decision that the arbitrator made an error of law and that, but for that error, a substantially different award must be made. *DAIIE v Gavin*, 416 Mich 407, 428-429; 331 NW2d 418 (1982); *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 176; 550 NW2d 608 (1996).

In this case, defendant was apparently given plaintiff's tapes as discovery and made written transcripts of them that were considered by the panel in the interest of saving time instead of listening to each tape. Plaintiff claims that defendant tampered with the tapes and the written transcripts and that the transcripts did not have the impact that the actual tapes would have as to the rude manner in which defendant treated her. Plaintiff further claims that the panel did not read the transcripts. However, defendant claims that the panel allowed plaintiff's attorney to play excerpts of the tapes that he believed to be relevant to the case. Furthermore, defendant alleges that plaintiff did not give defendant the tapes during the required discovery period and

⁴ The only circumstances in which a court can vacate an award are provided in MCR 3.602(J)(1):

(1) On application of a party, the court shall vacate an award if:

- (a) the award was procured by corruption, fraud, or other undue means;
- (b) there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights;
- (c) the arbitrator exceeded his or her powers; or
- (d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

The fact that the relief could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

that, therefore, the panel did not have to consider them at all. Also, at the end of the hearings, plaintiff's attorney attested that plaintiff had been given a fair hearing. Because the limited record of the hearings provided does not verify the claims of either party, plaintiff has failed to demonstrate that the panel refused to hear evidence material to the controversy. Furthermore, plaintiff's attorney's affirmation that plaintiff had equal opportunity to be heard is a waiver of this issue.

In addition, plaintiff claims that defendant committed fraud by (1) losing or destroying its own tape recordings of the telephone conversations between plaintiff and defendant's representatives, and (2) tampering with plaintiff's tapes when defendant was given them for discovery. Plaintiff alleges that defendant erased important parts of plaintiff's tapes and had its witness give false testimony to fill in the missing portions relied on by the panel in reaching their decision.

"A fraud is perpetrated on the court when some material fact is concealed from the court or some material misrepresentation is made to the court." *Matley v Matley (On Remand)*, 242 Mich App 100, 101; 617 NW2d 718 (2000). "However, . . . fraud on the court cannot be committed in an adversary proceeding with respect to facts not known by the court, but known by both parties." *Id.* at 101-102. This Court in *Matley* further stated:

Here, both parties were represented by counsel at the arbitration hearing. Therefore, defendant and his attorney had "the limited responsibility of presenting one side of the matters that a tribunal should consider" to make its decision. . . . [I]t was plaintiff's responsibility to correct any incorrect statement of fact or omission of fact made by defendant during the arbitration proceedings and to inform the court [of facts unknown to it]. She had the opportunity to do so in her arbitration brief and at the arbitration hearing, where she was represented by counsel.

Because we are now convinced that fraud on the court cannot exist in an adversary proceeding where the relevant facts are known by both parties, we . . . conclude that the trial court clearly erred in determining that defendant committed fraud at the arbitration. [*Id.* at 103-104 (citation omitted).]

Matley involved a divorce proceeding that used arbitration to decide the distribution of property. The defendant misrepresented the fact that he had possession of a vehicle for several months while the plaintiff had been paying lease and insurance payments on it. On remand, this Court decided that the plaintiff had an obligation and opportunity to bring this fact to the attention of the court and failed to do so. Therefore, the plaintiff's claim that the defendant committed fraud on the court was held to be unfounded. *Id.* at 103-104.

In the present case, plaintiff alleges fraud as a result of defendant's misrepresentations and false testimony regarding her conversations with defendant's representatives. However, plaintiff does not provide any evidence to support this allegation, other than her own unsubstantiated statements. Plaintiff does not present any evidence to show that defendant knowingly presented false information. In addition, plaintiff made her interpretation of the facts known to the arbitration panel through her attorney. The attorney attested that plaintiff had an equal opportunity to be heard. Furthermore, there is no indication on the face of the award itself

that the panel relied on this allegedly fraudulent evidence. In fact, the award granted plaintiff the amount that her attorney claimed her loss would have been had defendant liquidated the stock immediately after plaintiff reported the allegedly incorrect trades. If the panel had believed the allegedly untruthful testimony of defendant's witness, that plaintiff agreed to accept the shares, then there would have been no reason for the award because plaintiff would have assumed the risk of losing money on the shares and defendant would not owe plaintiff anything. Instead, the panel awarded plaintiff her actual loss on the BAMM shares. The panel heard both parties' evidence and arguments and made its evaluation, which this Court will not disturb under these circumstances.

Plaintiff next claims that the arbitration panel was not impartial. We disagree. The party who attacks the impartiality of an arbitrator carries the burden of proof. *Emmons v Lake States Ins Co*, 193 Mich App 460, 466; 484 NW2d 712 (1992). "To overturn the arbitration award, the partiality or bias must be certain and direct, not remote, uncertain or speculative." *Park v American Casualty Ins Co*, 219 Mich App 62, 71-72; 555 NW2d 720 (1996); *Kauffman v Haas*, 113 Mich App 816, 819; 318 NW2d 572 (1982). The standard of review for this issue is de novo. See *Belen v Allstate Ins Co*, 173 Mich App 641, 645; 434 NW2d 203 (1988).

Arbitrators must disclose to the parties any dealings that might create an impression of possible bias; however, the impression must be a reasonable one. *North American Steel Corp v Siderius, Inc*, 75 Mich App 391, 404; 254 NW2d 899 (1977). Here, the chairman of the arbitration panel and the defense attorney knew each other in a professional capacity only. The chairman disclosed that he and the defense attorney had just received notice that they were assigned to an arbitration panel together. The chairman assured plaintiff that he would be fair and impartial and that he could provide a fair hearing on plaintiff's claims. Plaintiff's attorney approved the panel as it was composed. Furthermore, the entire panel took an oath swearing to be impartial. Plaintiff has not shown any bias by the chairman or the panel. Because plaintiff failed to offer sufficient evidence, beyond mere speculation, to establish bias by the arbitration panel, the trial court did not err in refusing to vacate the arbitrator's award.

Plaintiff's final argument is that defendant prejudiced plaintiff by delaying the arbitration and circuit court proceedings. We disagree. Procedural matters are to be left to the arbitrator and are not judicially reviewable. *Bay Co Building Authority v Spence Bros*, 140 Mich App 182, 188; 362 NW2d 739 (1984); *Gozdor v Detroit Automobile Inter-Ins Exchange*, 52 Mich App 49, 51; 216 NW2d 436 (1974). The trial court's decision regarding the granting of a continuance is discretionary and is reviewed for an abuse of discretion. *Soumis, supra* at 32.

Defendant requested and received one adjournment during the arbitration process. The records indicate that plaintiff, not defendant, requested and received two adjournments before the motion hearing was held by the circuit court. Because the granting of an adjournment during arbitration is a procedural matter, this Court may not review the adjournment granted during the arbitration process. In so far as plaintiff alleges that defendant purposefully delayed the arbitration process to install the chairman on the arbitration panel, as noted, *supra*, the chairman was not biased. Therefore, plaintiff has failed to show that she was prejudiced by this adjournment. Likewise, since the record establishes that *plaintiff*, and not defendant, requested the adjournments before the hearing before the circuit court, plaintiff has not shown any prejudice arising from those adjournments.

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard Allen Griffin
/s/ Joel P. Hoekstra